



On appeal, respondent argues that the award should be for a scheduled injury to the knee only and all or a part of the award should be assessed against the Kansas Workers Compensation Fund.

Respondent also contends it has overpaid temporary total disability benefits in this case and is entitled to reimbursement from the Fund for such overpayment.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds that the Award should be affirmed.

#### **Findings of Fact**

1. On January 19, 1989, claimant injured her left knee while working as a nurse's aide for respondent Kingman Community Hospital. The injury occurred as claimant turned after taking care of a patient and getting the laundry. Claimant underwent arthroscopic surgery by Dr. Anthony G. A. Pollock on February 10, 1989. In 1990, Dr. David A. McQueen performed a total knee replacement and, in 1995, Dr. McQueen performed a revision of the knee replacement to address instability in the knee. Claimant also testified she has low back problems which she attributes to an altered gait as a result of the knee injury. The back problems began after the accident and before the knee replacement. She received injections to her low back in April 1990.
2. Claimant has a history of left knee problems. Her medial meniscus was removed in 1949. Dr. Pollock performed arthroscopic surgery in 1987.
3. Claimant also has a history of back problems. In 1977, she complained to her then treating physician, Dr. Henry O. Marsh, that her low back had bothered her all her life. Although x-rays taken at that time showed an "excellent back," Dr. Marsh diagnosed early degenerative disc disease. But at the time of her regular hearing in April 1998, claimant testified she had not had back problems before the 1989 knee injury. When asked specifically about Dr. Marsh's records, she testified she did not recall seeing Dr. Marsh for back problems.
4. For a brief period after the knee replacement, claimant returned to work at Siesta Home Health Care but she was unable to do the work. She testified the stress on her knee went into her back. She has not worked since.
5. Dr. McQueen testified by deposition and gave a rating and restrictions but did so before the revision surgery in 1995. He did not address problems with the back either in his testimony or in his treatment.

6. Dr. George G. Fluter examined claimant as an independent medical examiner at the request of the ALJ. He first saw claimant February 22, 1995. He rated the impairment as 75 percent to the left lower extremity and converted this rating to 30 percent of the whole body. He testified he converted the rating to a whole body rating because he concluded the back was also involved as a result of an altered gait. He recommended that claimant avoid crawling, avoid activities causing high impact load on the left lower extremity, and avoid other things which would cause a high load such as squatting, bending, and stair climbing.

Dr. Fluter saw claimant again on October 28, 1997, after the revision surgery. He again observed her antalgic gait pattern. At this time he rated the left lower extremity as 37 percent and he rated the impairment for the back as a DRE Category II or 5 percent of the whole body. He converted the rating for the knee to 15 percent of the whole body and combined the two ratings to arrive at a whole body rating of 19 percent. He testified the restrictions should be the same as he had previously recommended.

Dr. Fluter had not focused on claimant's 1977 back problems. When he reviewed the records from the 1977 back complaints, he agreed that the records indicated a DRE Category II in 1977. Nevertheless, it seems from Dr. Fluter's testimony as a whole that he believed claimant has some additional permanent back problems as a result of the altered gait following the 1989 accident. After reviewing the 1977 records, he concludes, for example, that one-third of the back problem is attributable to a preexisting condition with two-thirds attributable to the altered gait following the knee injury in 1989. He also testified after reviewing the records from 1977 that he believed a portion of claimant's back problems are related to the 1989 knee injury.

7. Dr. Robert A. Rawcliffe, Jr., examined claimant on May 20, 1996, at the request of respondent's counsel. He testified that claimant did not indicate to him she had any back problems. He rated the impairment as 75 percent to the left lower extremity which he converted to 30 percent of the whole body. He recommended she be limited to sedentary work. But Dr. Rawcliffe attributed all of claimant's impairment to a preexisting condition. According to Dr. Rawcliffe, the 1989 injury was a simple strain superimposed on the preexisting condition. He did say that the 1989 incident precipitated the onset of symptoms, but insisted the underlying condition necessitated the total knee replacement.

8. Mr. Jerry D. Hardin testified that claimant suffered a 51 percent loss of ability to work in the open labor market based on Dr. Fluter's restrictions and an 83 percent loss based on Dr. Rawcliffe's restrictions using the Labor Market Access computer program.<sup>1</sup> Mr. Hardin opined that claimant has no loss of ability to earn wages.

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<sup>1</sup> Dr. Rawcliffe's report recommends claimant be limited to sedentary work. In his deposition he also says he agrees with Dr. Fluter's restrictions and would not recommend more severe restrictions. Mr. Hardin refers to the report for Dr. Rawcliffe's restrictions and taken as a whole the Board does not believe Dr. Rawcliffe's testimony suggests he intended to change from his report. The Board has, therefore, given weight to Mr. Hardin's opinion that Dr. Rawcliffe's restrictions indicate a greater loss of ability to work than do Dr. Fluter's restrictions.

### Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1988 Supp. 44-501(a).
2. The Board concludes claimant has proven she suffered permanent impairment to her back from an altered gait due to her knee injury. This entitles her to a whole body disability. *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).<sup>2</sup> Respondent has argued, among other things that all of claimant's back problems existed before this accident. Certainly the suggestion in the 1977 records that claimant has had back problems all her life leads one to doubt that a problem that existed for 40 years, she was born in 1934, suddenly ceased. But there is no indication of any other medical treatment after 1977 and no indication she was having significant problems until this accident.
3. At the time of claimant's accident, the Act defined work disability in terms of loss of ability to earn wages and loss of ability to perform work in the open labor market. K.S.A. 1988 Supp. 44-510e. Although claimant has not lost the ability to earn a comparable wage, the evidence of labor market loss in this case overcomes the presumption of no work disability which applies under K.S.A. 44-510e if a claimant is earning a comparable wage.
4. At the time of claimant's accident, an aggravation of a preexisting condition was fully compensable. Preexisting disability was not deducted from the disability to be awarded as it is for accidents after July 1, 1993, under amendments to K.S.A. 44-501. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987).
5. The Board finds claimant has a 33.5 percent work disability. This conclusion is reached by giving equal weight to restrictions recommended by Dr. Rawcliffe and Dr. Fluter and the opinions of Mr. Hardin based on those restrictions. The conclusion also gives equal weight to the loss of ability to work in the open labor market (67 percent) and the loss of ability to earn a wage (0 percent) as authorized in *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).
6. The Board concludes the Kansas Workers Compensation Fund has no liability for the amounts awarded in this case. Under the law applicable at the time of claimant's accident, the Kansas Workers Compensation Act shifted liability for injuries to handicapped employees under certain circumstances. If the employer knowingly employed or retained a handicapped employee and that employee later suffered an injury which was caused or contributed to by the handicap, the Kansas Workers Compensation Fund is liable for all or a part of the benefits. K.S.A. 1988 Supp. 44-567.

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<sup>2</sup> Respondent cites *Riggan v. Coleman Co.*, 166 Kan. 234, 200 P.2d 271 (1948), in support of a contrary conclusion. Without conceding that it would support a contrary conclusion, the Board notes it was overruled in *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

The Board concludes the evidence does not establish that claimant was handicapped at the time of her 1989 accident. Respondent knew of claimant's knee surgery in 1987. In fact, claimant offered to resign because of the knee problems. But claimant testified she did not have any problems with her knee after the 1987 surgery. She continued with her normal activities, including gardening, bicycling, and walking. Respondent contends claimant wore a brace after the 1987 surgery but this appears to be an impression drawn from answers claimant gave when she misunderstood the question. She later clarified that she did not wear the brace until after the injury involved in this case.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on July 24, 1998, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Charles C. Steincamp, Wichita, KS  
S. Eric Steinle, Hutchinson, KS  
E.L. Lee Kinch, Wichita, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director